

NOT FOR PUBLICATION

APR 03 2009

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLARENCE O. SMITH, Deceased,

Plaintiff - Appellee,

v.

M. R. MALDONADO; et al.,

Defendants - Appellants.

No. 06-16998

D.C. No. CV-02-01473-
LKK/GGH

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Submitted March 18, 2009**

Before: LEAVY, HAWKINS, and TASHIMA, Circuit Judges.

Correctional Officers M.R. Maldonado and M.B. Scharosch appeal from the district court's order denying their motion for summary judgment based on qualified immunity in this 42 U.S.C. § 1983 action alleging that the officers

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

violated former inmate Clarence O. Smith's Eighth Amendment rights by housing him with another inmate who subsequently attacked him. We vacate and remand.

Smith died while this appeal was pending, and his apparent next-of-kin have not responded to this Court's order requesting proof that they are the executors and/or sole heirs of Smith's estate. Therefore, the district court's September 27, 2006, order granting in part and denying in part defendants' motion for summary judgment is vacated, and this case is remanded with directions to dismiss the action due to Smith's death. *See* Fed. R. App. P. 43.

VACATED and REMANDED.